No. 87-5367

Supreme Court, U.S.
FILED
JAN 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RALPH MILLS,

Petitioner,

VS.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JULIUS L. CHAMBERS
RICHARD H. BURR III
DEBORAH FINS*
99 Hudson Street
New York, New York 10013
(212) 219-1900

ANTHONY G. AMSTERDAM
New York University
School of Law
40 Washington Square South
Room 327
New York, New York 10012
(212) 998-6199

Attorneys for Amicus Curiae

*Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
STATEMENT OF INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
THE LOCKETT ISSUE	4
THE BOOTH ISSUE	19
CONCLUSION	21

TABLE OF AUTHORITIES

Cases:	Page
Andres v. United States, 333 U.S. 740 (1948)	10
Booth v. Maryland, ___ U.S. ___, 96 L.Ed.2d 440 (1987)	2,3,19,20
Eddings v. Oklahoma, 455 U.S. 104 (1982)	10,14
Gardner v. Florida, 430 U.S. 349 (1977)	2,3,20
Lockett v. Ohio, 438 U.S. 586 (1978)	passim
Sandstrom v. Montana, 442 U.S. 510 (1979)	8
Skipper v. South Carolina, ___ U.S. ___, 90 L.Ed.2d 1 (1986)	20
Statutes and Codes:	
Md. Code Art. 27 § 413(g)(4) (1986 Ann. Supp.)	14
Md. Code Art. 27 § 413(g)(5) (1986 Ann. Supp.)	15
Other Authorities	
Physician's Desk Reference (41 ed. 1987)	13

No. 87-5367

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

RALPH MILLS,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

On Writ of Certiorari
to the Court of Appeals of Maryland

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

The NAACP Legal Defense Fund is a not-for-profit corporation organized under the laws of New York for the purpose, among others, of assisting Black persons to secure their constitutional rights by the prosecution of lawsuits. Recognizing that the death penalty has traditionally

borne most heavily upon members of racial minorities and other disadvantaged segments of the population, the Fund has undertaken to represent Blacks and others charged with capital offenses since the days of the Scottsboro Boys cases. The Fund represented the petitioners in Lockett v. Ohio and in Gardner v. Florida and appeared before this Court as amicus curiae in Booth v. Maryland -- the major cases whose principles are at issue in this one.

Letters of consent by the parties to the filing of this brief are being submitted to the Clerk with the brief.

SUMMARY OF THE ARGUMENT

1. Mr. Mills' sentencing violated Lockett v. Ohio, 438 U.S. 586 (1978), because the instructions to the jury at the penalty phase of his capital trial prevented the jurors from giving

independent mitigating weight to the evidence proffered in mitigation. Reasonable jurors could have understood the instructions to require them to reject any evidence which they did not unanimously agree supported a specific statutory mitigating circumstance.

2. The use of the victim impact statement in this case violated not only Booth v. Maryland, ___ U.S. ___, 96 L.Ed.2d 440 (1987), but Gardner v. Florida, 430 U.S. 349 (1977) as well. The defense was prevented from introducing evidence of the victim's reputation for violence in support of a defense of provocation, but the victim impact statement described the victim as a non-violent person. The defense was not permitted to rebut, deny or explain the evidence of non-violence.

ARGUMENT

I. The Lockett Issue

Two questions seem to us decisive of Ralph Mills' claim under Lockett v. Ohio, 438 U.S. 586 (1978). Might a reasonable juror have understood the instructions and verdict form submitted at the sentencing phase of Mills' trial to mean that the jury was forbidden to consider any mitigating circumstance proffered by Mills unless the jurors unanimously found that that specific circumstance was proven to exist by a preponderance of the evidence? If so, did these instructions and verdict form, in the context of Maryland's definition of statutory mitigating circumstances and the particular mitigating evidence adduced by Mills, preclude the jury from giving Mills' evidence the "independent mitigating weight" to which it was entitled under

Lockett (438 U.S. at 605)?

(1) The answer to the first question is plainly yes. Now that the ambiguities of the Maryland statute have been resolved by the laborious interpretation placed upon it below, such misleading instructions will doubtless not be given in the future. But that is no solace to Mills. His jury was handed a verdict form which set out seven statutory mitigating circumstances each accompanied by a box to check "yes" or "no." Following these was an eighth, open-ended category of mitigation: "Other mitigating circumstances exist, as set forth below," with blanks below it and the ubiquitous "yes" and "no" checkblocks alongside. All of this was introduced, on the form, by the preamble: "[B]ased upon the evidence we unanimously find that each of the following mitigating circumstances which

is marked yes has been proven to exist by a preponderance of the evidence, and each mitigating circumstance marked no has not been proven by a preponderance of the evidence." (J.A. 101.) The trial judge read and explained this portion of the form to the jury in these words:

> "[B]ased upon the evidence we unanimously find that each of the following mitigating circumstances which is marked yes has been proven to exist by a preponderance of the evidence, and each circumstance marked no has not been proven by a preponderance of the evidence. Again I stress that your finding as to mitigating circumstances must be unanimous, that is you must all agree."

(J.A. 70-71.) (Earlier in the charge the judge had told the jury, regarding the sole aggravating circumstance alleged by the prosecution, that "in considering these matters, you must consider whether aggravating circumstance number two has been proven beyond a reasonable doubt. If

you unanimously conclude that it has been so proven, you should answer that question yes. If you are not so satisfied, then of course you must answer no." (J.A. 70.))

The majority in the Court of Appeals found that these instructions meant that the jury was required to be unanimous in order to check any box on the verdict form either "yes" or "no." If the jury was non-unanimous as to any item, then its proper course was to leave that item blank. In other words, the instruction meant:

> Based upon the evidence we unanimously find[: (1)] that each of the following mitigating circumstances which is marked yes has been proven to exist by a preponderance of the evidence, and [(2) that] each mitigating circumstance marked no has not been proven by a preponderance of the evidence.

It did not mean:

> Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked yes has been proven to exist by a preponderance of the evidence[;] and

each mitigating circumstance marked no has not been [so] proven by a preponderance of the evidence.

Perhaps some reasonable jurors might have read the instructions and the verdict form this way. But equally reasonable jurors[1] might have thought: "We have to be unanimous to make a finding and to check a box yes. If we're not unanimous, we can make no finding, so we check the box no." Nothing on the verdict form or in the instructions said that unanimity was required for a non-finding as well as for a finding. Nothing on the verdict form or in the instructions said or hinted that the jury was free to leave any item unanswered. (As the dissent below pointed out, no Maryland jury using this particular form has ever left a question unanswered.) A grammarian might have

---

1 See Sandstrom v. Montana, 442 U.S. 510, 514 (1979).

parsed the form -- as did the majority in the Court of Appeals -- by observing that "the clause referring to each mitigating circumstance marked 'no' is also the object of 'we unanimously find that.'" (J.A. 131.) But a practical-minded member of the jury panel might then have asked the grammarian: "So if we can't say 'yes' unanimously, what are we supposed to do? Where's the third box, for 'we just can't agree'?" There was none -- nor any explanation for its absence. And since both the verdict form and the court's instructions dealing with the weighing of aggravating and mitigating circumstances were explicit in identifying "circumstances marked 'yes'" with "circumstances unanimously found to exist" (see J.A. 101, 73) the grammarian would have had an uphill argument against the practical-minded juror in demonstrating

that no answer rather than a "no" answer was expected from a non-unanimous jury.

"That reasonable men might derive a meaning from the instructions given other than [what the Court of Appeals deemed to be] the proper meaning . . . is probable. In death cases doubts such as those presented here should be resolved in favor of the accused." Andres v. United States, 333 U.S. 740, 752 (1948).[2] Mills' life should not be taken on the merest speculation that the ambiguous jury instructions and verdict form revealed by this record were read in one rather than another equally plausible fashion by his

---

2 See also Eddings v. Oklahoma, 455 U.S. 104, 117-118 (1982) (concurring opinion of Justice O'Connor): "Because sentences of death are 'qualitatively different' from prison sentences, . . . this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim . . . or mistake."

jurors.

(2) The answer to the second question, whether the effect of the jury instructions and verdict form was to forbid the jury's consideration of mitigating evidence in violation of Lockett, is also plainly yes. Two of Maryland's statutory mitigating circumstances that were given to the jury to be checked "yes" or "no" on the verdict form -- and the two to which Mills addressed most of his defensive evidence -- were:

> The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance (J.A. 102),

and

> The youthful age of the defendant at the time of the crime (J.A. 102).

Mills was 20 at the time of the crime (J.A. 91), and in the second year of a 30-year sentence for a prior second-degree murder (J.A. 77). Before that, as his mother testified:

> "I went to Court every year since I can remember Ralph being twelve, thirteen years old, every single year, sometimes two, three times a year, sometimes two or three times a month."

(J.A. 54.) Mills "developed drug and alcohol abuse problems at a very early age" (Special Court Investigation, admitted at trial as State's Exhibit 1), was diagnosed as suffering from "MBD" or "minimum brain damage" (J.A. 48) -- an organic condition which, according to a prison-initiated psychological evaluation conducted 6 months prior to his present crime, "may effect [sic] his intellectual functioning and contribute to his acting out behavior" (State's Exhibit 3) -- and

might or might not also have been afflicted with schizophrenia or some other psychosis.[3]

What were the jurors to do with this evidence? Let us assume that a couple of them -- say, 3 of them -- took the view that the evidence established the

---

[3] Mills' mother testified that when he first began having behavioral problems at school he was seen on an emergency basis at the local Mental Hygiene Clinic. (J.A. 47-48.) The initial diagnosis was "minimal brain damage." (J.A. 48.) Later, a second provisional diagnosis was added which was not expressly stated to Mrs. Mills. But, she testified:

> "I asked [the therapist] ... if he was showing any signs of schizophrenia, cause there is schizophrenia in our family ... I was grabbing at anything I could grab at. She said yes. That's all she said was yes, but we can't tell now, it's too early. Then they ... decided to put him on Mellaril ...."

(J.A. 48.) Mellaril is used in the treatment of schizophrenia and other psychotic disorders. See Physician's Desk Reference 1778-79 (41 ed. 1987).

statutory mitigating circumstance that Mills' "capacity . . . to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance" (Md. Code Art. 27 §413(g)(4)(1986 Ann. Supp.)). The remaining 9 disagreed, being unconvinced that a mental condition diagnosed as "minimal brain damage" met the statutory criterion of "substantially" impairing Mills' capacity -- although these 9 jurors did believe that the condition was mitigating to some extent, particularly in combination with Mills' relative youth. Some of the 9 jurors, indeed, taking the view that "youth is more than a chronological fact,"[4] believed that Mills had shown by a preponderance of the

---

4 Eddings v. Oklahoma, 455 U.S. at 115.

evidence the distinct statutory mitigating circumstance described in the verdict form as "[t]he youthful age of the defendant at the time of the crime" (Md. Code Art. 27 §413(g)(5)(1986 Ann. Supp.)). Other jurors, however, interpreted the term "youthful age" more narrowly and were unwilling to find this statutory mitigating circumstance -- although they would have been inclined to accord some weight to Mills' chronological age of 20, and some to his emotional immaturity as well. But under the instructions and the verdict form, neither Mills' organic brain damage nor his immaturity could be given "independent mitigating weight"[5] -- nor could they be considered in mitigation at all -- because the jurors had not unanimously agreed in finding that they met the specific statutory definitions set

---

5 Lockett v. Ohio, 438 U.S. at 605.

forth in the instructions and the verdict form.

The unconstitutional result would be that although all 12 jurors were inclined to attribute significant mitigating value to slightly different aspects of the same evidence, none of the 12 could give any of this mitigating evidence any weight at all. To the contrary, their obligation as instructed would be:

(1) to mark the verdict form for the two pertinent statutory mitigating circumstances "no" -- there being, by hypothesis, no unanimity for either;

(2) to mark the verdict form for the non-statutory mitigating circumstance "no" -- since this category of mitigation was defined by the instructions as "any other mitigating circumstances not specifically enumerated in the first seven that we have just reviewed" (J.A. 73), and it would

hardly occur to jurors who had just debated and, for want of unanimity, rejected both "substantial" mental incapacitation and "youth" to turn around and view "minimal brain damage" and immaturity as "other" mitigating circumstances not previously reviewed; and

(3) to return a death verdict without further consideration of mitigation -- because this is what the jury instructions and the verdict form both said to do "if all of the answers [to the mitigating circumstances on the verdict form] were marked 'no'" (J.A. 103; see also J.A. 73).

The Ohio statutory scheme condemned in Lockett did not preclude the admission into evidence of "detailed information about [a capital defendant's] . . . intelligence, character, and background." 438 U.S. at 594. To the contrary, it

called for "considering the nature and circumstances of the offense and the history, character, and condition of the offender" in determining, yes or no, the presence of the three statutory mitigating circumstances prescribed. 438 U.S. at 612. Ohio law was clear that "the sentencing judge or judges may consider factors such as the age and criminal record of the defendant in determining whether any of the mitigating circumstances is established." 438 U.S. at 608. But because all of this broad array of evidence was "relevant for mitigating purposes only if it is determined that it sheds some light on one of the three statutory mitigating factors," the Ohio procedure was declared unconstitutional, 438 U.S. at 608, on the principle that a death-sentencing process

> "that prevents the sentencer in all capital cases from giving

> independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."

(438 U.S. at 605.) That is precisely the risk to which Maryland exposed Ralph Mills on this record, and his death sentence violates the Eighth Amendment if Lockett is the law.

II. The Booth Issue

The nature of the victim-impact evidence presented by the prosecution at the sentencing stage of this case self-evidently brings the case within Booth v. Maryland, ___ U.S. ___, 96 L.Ed.2d 440 (1987), and refutes the Court of Appeals' attempted distinction of Booth.[6] We

---

[6] State's Exhibit 1, a summary of an interview with the brother and sister-in-law of the homicide victim, appears at J.A. 85-86.

address the issue only to call to the Court's attention that the admission of this evidence violated not merely Booth but the basic Due Process principle invoked by the concurring Justices in Skipper v. South Carolina, ___ U.S. ___, 90 L.Ed.2d 1, 10-11 (1986): that a capital defendant must be "permitted to 'deny or explain' evidence on which his death sentence may, in part, have rested" (quoting Gardner v. Florida, 430 U.S. 349, 362 (1977)).

One of the disputed issues at the guilt phase of Ralph Mills' trial was whether the homicide of Paul Brown was the result of any provocation of Mills by Brown. See T. 495-496, 500-501.[7] In this connection, Mills attempted to present

---

7 "T." refers to the transcript of the trial and is used for references to material not contained in the parties' joint appendix.

evidence of Brown's apparent reputation for violence, which was excluded by rulings of the trial court. T. 443. Yet at sentencing, the prosecutor put in victim-impact evidence which portrayed Brown as "a good person who had a tough life, a lot of bad breaks, ... nobody to really give him a chance," and specifically asserted that "he wasn't violent" (J.A. 85). The prosecutor then urged that the unprovoked and cold-blooded nature of the killing warranted a death sentence. (J.A. 86). Like Skipper's jury, Mills' jury was permitted to hear only one side of the story, and the prosecutor then took advantage of that lopsided state of the record to argue for death.

III. Conclusion

Mills' death sentence should be reversed.

Dated: January 21, 1988.

Respectfully submitted,

JULIUS L. CHAMBERS
RICHARD H. BURR III
* DEBORAH FINS
99 Hudson Street, 16th Floor
New York, New York 10013
(212) 219-1900

ANTHONY G. AMSTERDAM
New York University
School of Law
40 Washington Square South
Room 327
New York, New York 10012
(212) 998-6199

Attorneys for Amicus Curiae

By:_____
Deborah Fins

* Counsel of Record